

Ho Kon Kim v Lim Gek Kim Betsy and another appeal and Others
[2001] SGCA 67

Case Number : CA 164/2000, 167/2000

Decision Date : 12 October 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Michael Khoo SC and Josephine Low (Michael Khoo & Partners) for the appellant in CA 164/2000 and the first respondent in CA 167/2000; M Amaladass, Sivakolunthu and Gn Chiang Soon (M Dass & Co) for the first respondent in CA 164/2000 and the second respondent in CA 167/2000; Leslie Chew SC, Lionel Tay and Esther Ling (Khattar Wong & Partners) for the third respondent in CA 164/2000 and the Fourth respondent in CA 167/2000; CR Rajah SC and Chew Kei-Jin (Tan Rajah & Cheah) for the first and second appellants in CA 167/2000; Tan Kok Quan SC and Chia Boon Teck (Tan Kok Quan Partnership) for the third respondent in CA 167/2000

Parties : Ho Kon Kim — Lim Gek Kim Betsy

Civil Procedure – Costs – Apportionment – Usual order of costs against two or more unsuccessful parties – Joint and several liability

Civil Procedure – Costs – Discretion of court – Denying successful appellant costs of appealing and costs below – Successful appellant did not appeal against trial judge's order on costs – Relevant circumstances

Judgment

GROUND OF DECISION

(Consequential Orders and Costs)

1. In our judgment delivered on 26 September 2001, we invited the parties in Civil Appeal No. 164 of 2000 to submit written arguments on what further consequential orders we should make to give effect to what we have decided, and the parties in Civil Appeal No. 167 of 2000 to submit written arguments on the issue of costs here and below. In response, the solicitors for the respective parties submitted their written arguments which we have now considered.

Civil Appeal No 164 of 2000

2. We deal first with the question of the further consequential orders we should make in Civil Appeal No. 164 of 2000.

Transfer of plot 3

3. In their written submissions, the solicitors for Madam Ho ask for an order that RHB, as the mortgagee in possession, apply at their own costs and expense to the relevant authorities for approval for subdivision of the property into three subdivided lots as contemplated in the sale agreement made between Madam Ho and Ms Lim, and upon such approval being granted, at their own costs and expense, to transfer the subdivided lot marked as plot 3 to Madam Ho without any payment and free from encumbrances. We are unable to accede to this request. There is no justification for such an order. While RHB, in taking the mortgage of the property, recognised Madam Hos interest in

the property and agreed to be bound by that interest, they did not agree to be bound by what Ms Lim had agreed to perform under the sale agreement. To direct RHB to take such steps would, in effect, require them to perform in part the obligations of Ms Lim under the sale agreement, to which RHB had never agreed either in the mortgage or in the Regulating Agreement. It may be that, at the end of the day, notwithstanding the realization of her interest in the property, Madam Ho would not be able to recoup the loss she has sustained, but she is not without remedy and is at liberty to have recourse against the relevant party or parties for recovery of her loss or any part of it, as she may be advised.

Costs to WLAW

4. The solicitors for Madam Ho also make lengthy submissions on the costs which the court below ordered Madam Ho to pay to WLAW upon dismissal of her claim against them. Although Madam Ho in the notice of appeal joined WLAW as the second respondents in Civil Appeal No. 164 of 2000, she did not in the Case for the Appellant appeal against the order below dismissing her claim against WLAW. Notwithstanding that, her solicitors in their written submissions raise an extraordinary argument that WLAW should now be deprived of the costs below, or in the alternative a Sanderson order or a Bullock order should now be made in her favour. We are unable to entertain such an application at this stage. The insurmountable obstacle in the way is that Madam Ho did not appeal against the order below dismissing her claim against WLAW with costs, and that order stands. It is not in any way affected by the judgment we have delivered.

5. We now come to the costs of WLAW in Civil Appeal No. 164 of 2000. Apparently they were not aware that Madam Ho was not pursuing her appeal against the dismissal of her claim against them until on or about 18 June 2001, when Madam Ho's solicitors served on their solicitors the Case for the Appellant. It is now submitted by the solicitors for WLAW that Madam Ho should bear and pay their costs incurred in the appeal up 18 June 2001. We agree with this argument. WLAW are entitled to such costs in the appeal, and we so order.

Claim of RHB

6. The solicitors for RHB in their written submissions also advance an extraordinary argument. They submit that, having regard to what we have decided, RHB now have a claim against WLAW for breach of duty and/or negligence on the part of Ms Leong, and that they propose to initiate an action against WLAW. By reason of this action or proposed action, RHB now seek a stay of the order for costs made against them. This argument is totally unsustainable. If RHB wish to clutch on what we have decided to found their cause of action against Ms Leong, they are of course at liberty to do so; no doubt they would take adequate and proper legal advice before so deciding. But whatever proceedings they wish to take, or are presently taking, is not a ground for a stay of the order made against them, whether in respect of costs or otherwise. We can find no reason for a stay.

7. Next, RHB request that the costs awarded against them and Ms Lim be apportioned in equal proportions so that each of them will bear only 50% of the costs. We are unable to accede to this request. The order we made against them in 55 of our judgment is against the two parties jointly and severally. Under that order, either or both of them will have to bear and pay the costs here and below of Madam Ho and the party who has paid the costs will be entitled to seek a contribution from the other. In this case, the fact that Ms Lim is a bankrupt and therefore is not in a position to make any contribution is not a ground for this Court to vary the order made. The order made is the usual order against two or more unsuccessful parties to an action or proceeding, whether as plaintiffs or

defendants.

Outgoings of the property

8. RHB seek a further consequential order that that Madam Ho should bear one third of the outgoings reasonably incurred in maintaining the property as from the date they took possession, including the property tax paid in respect thereof. We agree, and a consequential order to that effect should be made.

Consequential order

9. Further to what we have ordered on 26 September 2000, we now make the following consequential orders:

(1) that the property be sold at such time, in such manner and at such price as RHB and Madam Ho may agree, and in default of agreement as the court may direct; but nothing in this direction is deemed to relieve RHB from their obligations as mortgagee in exercising the power of sale;

(2) that for the purpose of giving effect to the above, RHB and/or Madam Ho be at liberty to apply to the High Court for all necessary directions in connection with the sale of the property; and

(3) that pending the sale of the property, the outgoings of the property reasonably incurred by RHB, including the payment of property tax thereon, shall be apportioned in the proportions of two-thirds thereof to RHB and one third thereof to Madam Ho, and in this connection an account be taken of the outgoings reasonably incurred by RHB.

Civil Appeal No 167 of 2000

10. We now turn to the question of costs in Civil Appeal No. 167 of 2000. The solicitors for Mr Wong and Mr Ponniah in their written submissions argue that, in so far as the proceedings under O 59 r 8 and this appeal are concerned, their clients should be considered as the successful parties, and that WLAW and RHB the unsuccessful parties, and accordingly costs should follow the event. They further submit that the appellants have not misconducted themselves in any way and there are no particular circumstances or reasons which call for the court to make any other order as to costs.

11. On the other hand, the solicitors for RHB in their written submissions argue that there are in this case special circumstances which call for a departure from the normal rule that costs follow the event. They draw our attention to the conduct of Mr Wong in handling the transaction for Madam Ho, which gave rise to the litigation and also the conduct of Mr Ponniah in prosecuting the claim which was certainly not beyond reproach, and that having regard to such conduct no order as to costs both here and below should be made.

12. The general principles are that costs are in the discretion of the court, and that costs should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made: *Re Elgindata (No. 2)* [1993] 1 All ER 232, *Tullio v Maoro* [1994] 2 SLR

489. In considering such an issue the court is entitled to look at all the circumstances of the case including any matters that led to the litigation. Thus, in *Bostock v Ramsey Urban District Council* [1900] 2 QB 616, the successful defendant was deprived of its costs and in coming to this conclusion the court took into account conduct of the defendant prior to the litigation, which led the plaintiff reasonably to suppose that he had a cause of action against the defendant and thus induced him to commence the action. A L Smith LJ said at p 622:

It seems to me that the Lord Chief Justice was right when on general principles he came to the conclusion that "the judge is not confined to the consideration of the defendants conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation." I say on general principles, because his attention does not appear to have been called to the case of *Harnett v Vise* 5 Ex D 307, in which it was distinctly held by the Court of Appeal that the judge is not confined, in considering the question whether there is good cause for depriving the successful party of costs, to the conduct of the parties in the litigation itself, but must consider the whole circumstances of the case and everything which led to the action. I think that in this case there was evidence of conduct on the part of the defendants such as to lead the plaintiff reasonably to think that he had a good cause of action against them, and which the judge was entitled to take into consideration as constituting good cause for depriving the defendants of costs.

13. In *Lee Seng Choon Ronnie v Singapore Island Country Club* [1993] 2 SLR 456, although the appellant there successfully obtained the declaration sought by him pertaining to the retention of his club membership, the Court of Appeal nevertheless deprived him of the costs of the appeal and the hearing below after taking into account the appellants conduct. The Court said at p 465:

For the reasons we have given in this judgment this appeal succeeds, but the appellants conduct has not commended itself to us. His denial of having received the notices sent to him by the club and yet being able to produce to the court the third and final reminder [effectively the second notice under r 47(e)] claiming it was a file copy obtained for him by an unnamed friend, when the club did not keep copies of the second and subsequent reminders, was deplorable. The sending of an unsigned cheque might be excused but failure to pay relatively small amounts of his clubs bills under the pretext of frequent travelling abroad and the unauthorized signing of chits by his son are really inexcusable and show a cavalier attitude and disregard of the clubs rules.

Although the appellant has succeeded in his appeal and he is entitled to a declaration that he was at all material times a member of the club, which we duly grant him, he is not entitled to an order for the assessment of damages or to the other two declarations sought. We further record our disapprobation of the appellants conduct by denying him the costs of this appeal as well as the costs before the learned judicial commissioner.

14. Similarly, in *Universal Westech (S) Pte Ltd v Ng Thiam Kiat & Ors* [1997] 2 SLR 139, Kan Ting Chiu J found that although the plaintiff in that case failed in its claim against the first defendant, the latters conduct towards the plaintiff was not beyond reproach as he had probably used a business plan to compete with his ex-employers and had led the second defendant into breaching his fiduciary duty as an employee of the plaintiff. The learned judge then deprived the first defendant of half of his costs. The learned judges decision on costs was subsequently upheld by the Court of Appeal: see *Ng*

15. We now revert to the facts of this case. First, it is quite apparent to us that the manner in which Mr Wong had handled the transaction for Madam Ho had, to a considerable extent, contributed to the present litigation. Secondly, there was a serious objection to Mr Ponniah acting for Madam Ho and also the objectionable manner in which he had conducted the litigation below. The judge below dealt with the conduct of both Mr Wong and Mr Ponniah in some detail and was extremely critical of Mr Wong on the tardy manner in which he sought to protect Madam Hos interest in the property, and the manner in which Mr Ponniah conducted the litigation. While we allowed the appeal, we did not disapprove of what the judge said with reference to their conduct, which we find is relevant in deciding the question of costs. Having regard to these matters, we decide not to award any costs to Mr Wong and Mr Ponniah here and below. We therefore make no order as to costs. The deposit in court, with interest, if any, is to be refunded to them.

Sgd
YONG PUNG HOW
Chief Justice

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L P THEAN
Judge of Appeal
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CHAO HICK TIN
Judge of Appeal